

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In re Applications of)	CC Docket No. 91-142
)	
BRAVO CELLULAR)	File No. 10673-CL-P-579-A-89
For facilities in the Domestic Public Cellular)	
Telecommunications Radio Service on)	
Frequency Block A, in Market 579,)	
North Carolina 15 - Cabarrus)	
)	
CENTAUR PARTNERSHIP)	FEDERAL COMMUNICATIONS COMMISSION File No. 10720-CL-P-651-A-89 10720-CL-P-651-A-89
For facilities in the Domestic Public Cellular)	
Telecommunications Radio Service on)	
Frequency Block A, in Market 631,)	
South Carolina 7 - Calhoun)	
)	
EJM CELLULAR PARTNERS)	File No. 10116-CL-P-721-A-89
For facilities in the Domestic Public Cellular)	
Telecommunications Radio Service on)	
Frequency Block A, in Market 721,)	
Wyoming 4 - Niobrara)	
)	
EJM CELLULAR PARTNERS)	
For facilities in the Domestic Public Cellular)	File No. 10567-CL-P-596-A-89
Telecommunications Radio Service on)	
Frequency Block A, in Market 596,)	
Oklahoma 1 - Cimarron)	

To: The Commission

OPPOSITION TO PETITION FOR RECONSIDERATION

Bravo Cellular, L.L.C. (the successor to Bravo Cellular, hereinafter referred to as "Bravo"),¹
pursuant to § 1.106(g) of the Commission's rules, by its attorneys, hereby opposes the Petition for

-
1. On Nov. 6, 1998, the Commission Public Notice (Report No. LB-99-08) announced the grant of the *pro forma* assignment from Bravo Cellular to Bravo Cellular, L.L.C.

0015103.01

No. of Copies rec'd 0+4
List ABCDE

Reconsideration filed by Castle Trust, Orbit Cellular, RSA Cellular Partners, Schuylkill Mobile Phone, Inc., B. Scott Reardon, III, Skyline Cellular Partners, Sunrise Trust, and Walker Trust (collectively referred to as "Petitioners"). Pursuant to the recent Memorandum Opinion and Order adopted in *K.O. Communications*,² the Commission may consider striking the pleading and imposing additional sanctions. This consideration may be in order because the Petition For Reconsideration contains neither substantive nor meritorious arguments, it has no legitimate basis for its filing other than to harass the parties involved and attempt to extract a settlement payment from them, and it is purposefully misleading.

PROCEDURAL BACKGROUND

On June 3, 1997, the Commission released its decision in *Algreg Cellular Engineering*, 12 FCC Rcd 8148 (1997) ("*Algreg V*").³ *Algreg V* dealt, *inter alia*, with Petitions to Deny lottery applications of various tentative selectees, including Bravo's. The original applications were filed, and a lottery was held, in the late 1980's. There is an extensive procedural history of this proceeding leading up to the Order in *Algreg V*. To the best of Bravo's knowledge, none of the Petitioners herein participated in these proceedings despite ample notice and opportunity to participate. In fact, this nearly identical group of Petitioners had their attempted appeal of *Algreg V* unequivocally dismissed *twice* by the U.S. Court of Appeals for the District of Columbia Circuit. The Court of Appeals held that, "[b]ecause appellants failed to file a Petition for Reconsideration . . . and were not

2. *Memorandum, Opinion and Order, K.O. Communications, et al.*, ___ FCC Rcd ___ (Wireless Telecommunications Bureau, DA 98-2643, Rel. Dec. 31, 1998) ("*K.O. Communications*").

3. This Order is referred to as *Algreg V* because there were four previous Orders issued in this proceeding between 1991 and 1994.

parties to the administrative proceedings during which the validity of the construction permits . . . at issue here were challenged . . . they are not entitled to judicial review.⁴ Not satisfied with being dismissed, the appellants returned to the Court of Appeals seeking reconsideration of the decision and a rehearing *en banc*. The Court again dismissed their requests.⁵ Still believing they could manufacture standing in the proceeding despite overwhelming authority, Petitioners filed a “Statement For the Record” on June 29, 1998 stating, in essence, that the Court of Appeals was wrong in denying their standing, and that they therefore were taking the novel and unprecedented action of “electing” to participate before the FCC.⁶

The Commission did not explicitly grant Bravo’s application in *Algreg V*. In granting several other applications involved in the proceeding, the Commission held that Bravo was required to, and would be allowed to, file a clarifying amendment to its application. The Commission ordered the application remanded to the Bureau for expedited review and consideration in accordance with “usual application procedures.” (*See Algreg V* at 8152, 8181). Accordingly, the Commission dealt with all outstanding Petitions To Deny in the proceeding, and the Bureau was ordered to expeditiously grant Bravo’s application provided the amendment thereto was acceptable pursuant to the usual application procedures. Bravo timely filed a minor amendment to its application, and on November 6, 1997, the Commission issued a Radio Station Authorization for Cellular

4. *Turnpike Cellular Partners v. FCC*, No. 97-1421 (D.C. Cir., Dec. 16, 1997); *rehearing denied* (March 30, 1998).

5. *Turnpike Cellular, supra* (March 30, 1998 Orders).

6. Several parties, including Bravo, filed a “Joint Motion to Strike So-Called Statement for the Record” on July 22, 1998. The Commission has not yet ruled on these filings.

Radiotelephone Service to Bravo. The authorization had a June 3, 1997 grant date, and a November 6, 1997 issue date.

Petitioners filed a "Request For Rescission of Authorizations" on May 8, 1998, alleging that Bravo's application, among others, was erroneously granted, without public notice, and in contravention of the express terms of the Commission's June 3, 1997 Order in *Algreg*. Bravo filed an Opposition to the request⁷ and argued, *inter alia*, that Petitioners were precluded from challenging the underlying *Algreg V* Order because, as the D.C. Circuit held, they lacked standing. Bravo also pointed out that the Court made clear that Petitioners were not entitled to any consideration based on arguments that they must protect their right to further participate if *Algreg V* is overturned. The Court stated, "in any event, the parties and the FCC agree that should the Commission's Order be overturned . . . the appellants . . . will be able to compete for the disputed licenses and permits."⁸ Bravo specifically argued in its Opposition that any legitimate challenge to the issuance of the authorization to Bravo must be strictly limited to the four corners of the amendment itself, and that because of the already protracted nature of this proceeding and the clear decision of the Court of Appeals, any attempt by Petitioners to challenge the underlying *Algreg V* decision would clearly be filed for other than legitimate reasons. Bravo went on to state that any filing challenging the underlying *Algreg V* Order cannot be countenanced by the Commission and should, therefore,

7. "Opposition to Request For Rescission of Authorizations" dated May 19, 1998 ("Opposition").

8. *Turnpike Cellular, supra* (Dec. 16, 1997).

subject the parties filing such frivolous pleadings to sanctions by the Commission in accordance with §§ 1.24 and 1.52 of the Commission's rules .”⁹

After the filing of the Request for Rescission, Oppositions thereto and a Reply by Petitioners, the Commission issued a Public Notice on November 27, 1998, stating that the Bravo, EJM and Centaur applications which were remanded by *Algreg V* “[i]nadvertently . . . showed a grant date of June 3, 1997,” and the authorizations “were being issued with corrected issue dates.” Thus, Public Notice of the grants was given in accordance with the original request of the Petitioners. It appears that Petitioners are seeking Reconsideration of the issuance of the November 27, 1998 Public Notice. Petitioners’ indicate they are seeking “reconsideration of the grant” of the subject applications; however, the November 27 Public Notice merely indicated the Commission was “reissuing” the authorizations with new grant dates, *not* granting the applications.

THE PETITION IS WITHOUT MERIT

The misplaced, repetitive and misleading position of Petitioners is that the Commission cannot grant the subject applications without first considering the pending Petitions for Reconsideration. This position is wrong, and Petitioners know it is wrong.

First, in their June 2, 1998 “Reply to Oppositions to Request For Rescission of Authorizations,” the Petitioners themselves admitted that there is no requirement to consider Petitions for Reconsideration prior to the grant of the remanded applications.¹⁰ Despite this

9. Bravo Opposition at 6.

10. Petitioners stated: “While the Communications Act does not compel final actions on Petitions For Reconsideration prior to grant of the remanded applications, there is no question that it at least requires that such pleadings be considered.”

admission, Petitioners allege in their Petition for Reconsideration that the Commission will “be unable to fulfill its statutory duties with respect to consideration and resolution of the pending reconsideration pleadings.” Second, to add insult to injury, Petitioners cite as authority for the proposition that the Commission must consider the Petitions for Reconsideration before granting applications the case of *JAJ Cellular v. FCC*, 54 F.3d 834 (D.C. Cir. 1995).¹¹ Petitioners even indicate that the *JAJ Cellular* case involved a Petition to Deny. Certainly, having participated before the Commission on numerous occasions, Petitioners and their counsel must be aware of the difference between a Petition to Deny and a Petition for Reconsideration. There is no question that a Petition to Deny must be resolved before an application can be granted. This is not true of a Petition for Reconsideration, and Petitioners are well aware of this fact.

Third, in what appears to be a continuing effort to mislead the Commission, Petitioners state that “grant of the captioned applications prior to full and final resolution of the pending petitions for reconsideration will render those petitions moot with respect to the four markets in question . . .”¹² This statement is patently false because the Commission’s reconsideration of its decision in *Algreg V* will, without question, relate to all the applications against which valid and timely reconsideration was sought. The Court of Appeals even stated this fact explicitly in its decision denying Petitioners standing. If one were to adopt the preposterous position of Petitioners, then there are no applications

11. According to the “Blue Book,” *A Uniform System of Citation*, using the “*see also*” signal as Petitioners have done, means that “[c]ited authority constitutes additional source material that supports the proposition. ‘*See also*’ is commonly used to cite an authority supporting a proposition when authorities that state or directly support the proposition already have been cited or discussed.

12. Petition for Reconsideration at p.2.

which will be affected by a decision on reconsideration of the *Algreg V* Order. This is sheer nonsense. The Commission has issues under reconsideration and its decision on reconsideration is not relevant to whether the applications are granted at this time.

Fourth, based on their prior participation in numerous Commission proceedings, it is inconceivable that Petitioners and their counsel are not aware of §1.106(n) of the Commission's rules which provides that the filing of a Petition for Reconsideration has no affect on the Commission decision unless a stay is issued. The Commission has consistently held that when Petitions For Reconsideration of actions on applications are pending, the fact that permittees proceed to make substantial expenditures under the construction permit will not prevent the Commission from making a full and fair determination of the merits of the Petition for Reconsideration.¹³

Fifth, while Petitioners argue in their Petition for Reconsideration that there are **two** petitions for reconsideration pending, they admitted in their Reply that Bravo's application was exempted from the Applicants Against Lottery Abuses', *et al.*("AALA") Petition for Reconsideration.¹⁴ Moreover, based on the Petitioners' history at the Court of Appeals, they surely are aware that the other pending Petition for Reconsideration is on extremely thin ice. Furthermore, the Petitioners fail to mention that the other Petition for Reconsideration does not even raise all of the arguments contained in the AALA Petition.

13. See, e.g., *Monocacy broadcasting Co.*, 20 RR 1132 (1960) and *Liberty Television, Inc.*, 20 RR 1132 (1960)(where the Commission denied stays of actions on applications based on the fact that reconsideration must be concluded prior to allowing the applicant to proceed.)

14. At footnote 9, p.4 of their reply, Petitioners stated: "Bravo notes that Applicants Against Lottery Abuses, *et al.* specifically exempted Bravo's application from their "Petition for Reconsideration" filed with the Commission on July 3, 1997.

**THE COMMISSION COULD CONSIDER IMPOSING SANCTIONS
UPON PETITIONERS**

Based on the foregoing, it is abundantly clear that there is no merit in Petitioners' position and, in fact, that they were aware of this because they were so informed by the Court of Appeals. Based upon these circumstances, the Commission should inquire into Petitioners' intent in filing their Petition for Reconsideration. Bravo believes that the only reason for filing the Petition was to harass Bravo and the other applicants involved, and to attempt to extract a settlement payment in order to make Petitioners go away.

The Wireless Telecommunications Bureau, relying on a Commission pronouncement, recently held in *K.O. Communications* that:

The Bureau will not tolerate frivolous pleadings or pleadings filed for the purpose of extracting settlements from our licensees and applicants. If circumstances surrounding the filing of a pleading raise questions concerning abuse of process, we will . . . investigate thoroughly. The Bureau will vigorously follow the Commission's directive to take appropriate enforcement action against frivolous and improper pleadings.¹⁵

In *K.O. Communications* the Bureau indicated that abuse of process includes such conduct as harassing an opponent, or filing a pleading for the purposes of effectuating a settlement. The decision went on to indicate that circumstantial evidence could be sufficient to prove that a petitioner abused the Commission's process when the account of the intent was "at best without credibility and at worst false and misleading."¹⁶

15. *K.O. Communications* at ¶31, citing *Commission Takes Tough Measures Against Frivolous Pleadings*, 11 FCC Rcd 3030 (1996).

16. *See WWOR-TV, Inc.*, 7 FCC Rcd 636, 638 (1992).

As detailed above, there is no legitimate purpose for the filing by Petitioner. Moreover, the circumstances leading up to the filing, and the Petitioners' own representations make it clear that the Petitioners knew they provided no substantive grounds to file their Petition. Even under these circumstances, Petitioners attempt to misguide the Commission by citing to irrelevant case law, and making statements they had previously admitted were not accurate. In considering the facts involved herein, the Commission may also look to §1.52 of the rules which states, in part, that:

The signature . . . [on a pleading] by an attorney constitutes a certificate by him that he has read the document; that to the best of his knowledge, information, and belief there is good ground to support it; and that it is not interposed for delay.

Upon consideration of the facts set forth herein and the long and arduous procedural history of the *Algreg* case, it would be difficult to understand how the Commission could find that the Petition was signed in accordance with this rule provision. The Commission should act expeditiously to put the public on notice that this type of conduct will not be tolerated by the Commission.

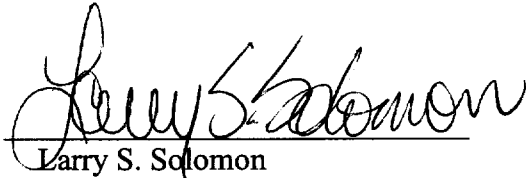
CONCLUSION

Based on the facts as set forth herein, the Commission must, at the very least, deny the Petition for Reconsideration. In order to preserve the integrity of the Commission's process, the Commission should strike the Petition, and should investigate the necessity for imposing additional sanctions as are appropriate in accordance with the circumstances described herein.

Respectfully submitted,

BRAVO CELLULAR, L.L.C.

By:

A handwritten signature in black ink, appearing to read "Larry S. Solomon", written over a horizontal line.

Larry S. Solomon

SHOOK, HARDY & BACON, LLP

1850 K Street, N.W.

Suite 900

Washington, D.C. 20006

Telephone: 202-783-8400

E-mail: lsolomon@shb.com

Dated: January 11, 1999

CERTIFICATE OF SERVICE

I, Kay Dallosta, a secretary in the law offices of Shook, Hardy & Bacon L.L.P., do hereby certify that I have on this 11th day of January, 1999, had copies of the foregoing "OPPOSITION TO PETITION FOR RECONSIDERATION" to be sent via U.S. first class mail, postage prepaid, to the following:

Daniel M. Armstrong, Associate General Counsel
Roberta L. Cook, Counsel
Office of General Counsel
Federal Communications Commission
1919 M Street, N.W., Room 602
Washington, D.C. 20554

Daniel Phythyon, Chief
Wireless Telecommunications Bureau
Federal Communications Commission
2025 M Street, N.W., Room 5002
Washington, D.C. 20554

Steve Weingarten, Chief
Commercial Wireless Division
Wireless Telecommunications Bureau
Federal Communications Commission
2100 M Street, N.W., Room 700
Washington, D.C. 20554

John Riffer, Assistant General Counsel -
Administrative Law
Office of General Counsel
Federal Communications Commission
1919 M Street, N.W., Room 610
Washington, D.C. 20054

John P. Blankson, Jr., Esquire
Drinker, Biddle & Reath
901 15th Street, N.W., Suite 900
Washington, D. C. 20005-2503

Alan Y. Naftalin, Esquire
Koteen & Naftalin, L.L.P.
1150 Connecticut Avenue, N.W.
Washington, D.C. 20036

Stephen Kaffee, Esquire
Law Office of Stephen Kaffee, P.C.
733 15th Street, N.W., Suite 700
Washington, D.C. 20005

Carl W. Northrop, Esquire
Paul, Hastings, Janofsky & Walker, L.L.P.
1299 Pennsylvania Avenue, N.W., 10th Floor
Washington, D.C. 20004-2400

David L. Hill, Esquire
O'Connor & Hannan, L.L.P.
1919 Pennsylvania Avenue, N.W., Suite 800
Washington, D.C. 20006

Barry H. Gotfried, Esquire
Fisher, Wayland, Cooper, Leader &
Zaragoza, L.L.P.
2001 Pennsylvania Avenue, N.W., Suite 400
Washington, D.C. 20006-1851

David Kaufman, Esquire
Brown, Nietert & Kaufman, Chartered
1920 N Street, N.W., Suite 660
Washington, D.C. 20036


Richard S. Myers, Esquire
Myers Keller Communications Law Group
1522 K Street, N.W., Suite 1100
Washington, D.C. 20005

Donald J. Evans, Esquire
James A. Kline, IV, Esquire
Evans & Sill, P.C.
919 18th Street, N.W., Suite 700
Washington, D.C. 20006

Harry F. Cole, Esquire
Bechtel & Cole, Chtd.
1901 L Street, N.W. - Suite 250
Washington, D.C. 20036

William J. Franklin, Esquire
William J. Franklin, Chartered
1200 G Street, N.W., Suite 800
Washington, D.C. 20005

Thomas Carroccio, Esquire
Bell, Boyd & Lloyd
1615 L Street, N.W., Suite 1200
Washington, D.C. 20036-5610



Kay Dallosta